



What Happens When Lawyers do not Comply with Confidentiality Requirements in a Lawsuit?

A recent decision from the United States Court of Appeals for the Seventh Circuit answered the question about what penalties an attorney may be subject to if a confidentiality order restricting documents is violated in connection with a lawsuit. Although the decision summarized in this short column also involved many other violations, random comparisons with other decisions are provided that involve much less Draconian penalties for breach of confidentiality provisions.

I. *Salmeron v. Enterprise Recovery Systems, Inc.*

A. Background

In a *qui tam* action involving allegations of fraudulent student loan debt collection practices, the U.S. Court of Appeals for the Seventh Circuit affirmed the district court's decision to dismiss the suit with prejudice as a penalty for the attorney's willful leaking of the opponent's sensitive document. See *Salmeron v. Enter. Recovery Sys.*, 2009 U.S. App. LEXIS 19316 (7th Cir., Aug. 27, 2009).

Rhonda Salmeron filed a suit against her ex-employer, Enterprise Recovery Systems, Inc., alleging that it engaged in fraudulent student loan debt collection practices. Salmeron later amended her complaint to add USA Funds, Inc.; Sallie Servicing L.P.; and others as additional defendants.

During the three years the lawsuit progressed in district court, her attorney repeatedly missed filing deadlines and failed to appear at conferences. Citing personal issues and a heavy workload for the delays, her attorney was granted numerous extensions yet continued to miss the supplemental deadlines. Fed up with the attorney's "virtually unbroken pattern of dilatory and irresponsible conduct," the district court dismissed the suit without prejudice *sua sponte* after the attorney once again failed to timely respond by a third extended deadline. See *U.S. ex rel. Salmeron v. Enter. Recovery Sys.*, 2008 U.S. Dist. LEXIS 73616 (N.D. Ill., Aug. 18, 2008). Although the district court reinstated the suit, it also issued the attorney a "final warning," stating that future misconduct on his behalf would reap serious consequences. Nevertheless, the attorney continued his pattern of misconduct by leaking his opponent's sensitive documents in violation on an "attorneys' eyes only" agreement.

In June 2008, defendants learned that a copy of a confidential document containing the Guarantee

Services Agreement between Sallie Mae and USA Funds had been leaked to the Web site Wikileaks.org and the *Chronicle of Higher Education* (the "*Chronicle*"). The leaked document bore a stamp demonstrating that it had come from USA Funds' document production during this suit. USA Funds then moved to dismiss the suit as a penalty for disclosure of the document.

B. Procedural and Factual Setting

During discovery, USA Funds' counsel and plaintiff's counsel agreed to keep the Guarantee Service Agreement confidential based on an "attorneys' eyes only" agreement. The agreement was a temporary measure until the existing protective order could be amended to include all parties and necessary documents. In addition to the "attorneys' eyes only" agreement, USA Funds submitted a draft protective order to the plaintiff's attorney that encompassed the Guarantee Service Agreement; but the plaintiff's attorney failed to return his modifications to the proposed order, and instead divulged the confidential document to third parties.

At the hearing on the motion to dismiss, the plaintiff's attorney admitted to the district court that he disclosed the Guarantee Service Agreement to his client, another attorney, and a *Chronicle* reporter. He also later admitted that if he had referred to the cover letter attached to the document, he would have been aware of the "attorneys' eyes only" agreement. The district court found that he had willfully violated the "attorneys' eyes only" agreement, and dismissed the case with prejudice.

C. Seventh Circuit Decision

Salmeron appealed the district court's dismissal of the case to the Seventh Circuit, which affirmed, holding that the district court did not clearly err or abuse its discretion. The court highlighted that the disclosure to the *Chronicle* reporter, which any reasonable person would know would lead to its publication, was more than sufficient to show willfulness.

The court also rejected Salmeron's tandem arguments that the disclosure of the Guarantee Service Agreement was not sanctionable because: (1) no protective order was in place; and (2) the district court had not yet found good cause to keep the document confidential. According to the court,

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the protective-order process was bypassed when the document was leaked. Thus, according to the court, Salmeron could not complain of a lack of a good cause ruling.

The court further held that USA Funds was not to blame for failing to seek a protective order sooner when it did not promptly hear back from the opposing lawyer. Highlighting the rules of professional conduct, the court noted that attorneys are permitted to take opposing counsel at their word. Thus, USA Funds was entitled to rely upon promises that he would keep the document confidential and respond to the protective order.

Salmeron further complained that she was not adequately warned that dismissal would result from her attorney's disclosure. The court flatly rejected this contention, finding that the earlier dismissal of the lawsuit without prejudice was a "warning shot." The district court adequately apprised the plaintiff's attorney that his further misconduct would result in drastic consequences for him and his client.

Ultimately the Seventh Circuit held that the district court did not clearly err in finding that the attorney willfully leaked the document, nor did it abuse its discretion by dismissing Salmeron's suit with prejudice as a penalty for her lawyer's misconduct.

II. Short Comparison of Random Related Cases

A random sampling of other cases that have dealt with the issue of failure to comply with confidentiality agreements or orders in connection with documents produced in litigation include the following. In *eBay Domestic Holdings, Inc. v. Newmark*, No. 3705-CC (Del. Ch., Sept. 16, 2009), the Delaware Court of Chancery allowed for the return or "clawback" of inadvertently produced documents without a waiver of privilege. This case involved not only an issue about which documents were privileged, but also a dispute about

whether certain documents should be designated as merely "confidential" as compared to "highly confidential," the latter designation requiring that the documents would be viewed by outside counsel only, and not their clients, including a prohibition against in-house counsel viewing those documents. Also instructive is *Postorivo v. AG Paintball Holdings, Inc.*, 2008 WL 3876199 (Del. Ch., Aug. 20, 2008), in which the Court recognized that in modern commercial litigation, especially due to the enormous volume of electronic discovery involved, the risk of inadvertent production of confidential or privileged data is great. The 70-page opinion explained in detail various violations by counsel of certain obligations, which included use of privileged data, which the Court explained should result in disqualification of counsel.

By comparison, in *Portnoy v. Cryo-Cell International, Inc.*, 2008 Del. Ch. LEXIS 6 (2008), the Delaware Court of Chancery declined to award some relief that otherwise may have been granted, due in part to the apparent violation of a confidentiality agreement by the plaintiff, who otherwise was given the relief requested in connection with a challenge to the election of directors as a result of the improper actions of management leading up to and during an annual meeting of shareholders. See generally *Southeastern Mechanical Services, Inc. v. Brody*, 2009 WL 2883057 (M.D. Fla. Aug. 31, 2009) (imposing the penalty of an adverse inference for failure to preserve data on the Blackberries of employees of a company that was subject to a TRO). ♦

AUTHOR'S NOTE: Importantly, I would like to thank Maura Burke, a new associate in our firm, for her invaluable contribution to this article.

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